the plaintiff be at liberty to sign final judgment against the defendant for the sum of $306,428.34 together with interest on the principal sum of $255,000 at 18% pa from 3 October 1984 till the date of judgment and thereafter at 8% pa till the date of realization.

Appeal allowed.

Solicitors: *Skrine & Co; Lek Yan & Co.*

Reported by *Yap Shao Sin*

Ponniah v Sivalingam & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D4-22-322-89
ZAKARIA YATIM J
10 MAY 1990

Trusts and Trustees — Presumption of gift and advancement — Shares allotted to parties — Share certificates retained by donor — Whether donor had intention to give shares to children and wife — Whether evidence given by donor admissible

Civil Procedure — Summary judgment application — Declaration sought — Whether court has jurisdiction to grant declaration

The plaintiff is the natural and lawful father of the first to the seventh defendants and lawful husband of the eighth defendant. The ninth and tenth defendants are companies incorporated in Malaysia in which the plaintiff and the defendants are shareholders.

In 1953, the plaintiff commenced business as a sole proprietor. The business prospered and he incorporated the first company in 1977 and the second in 1979. He transferred all his rights, titles, benefits and interest in the business to the first company ('SFM') and all his immovable assets to the second company ('SSB') in consideration of the two companies issuing 2,000 and 775,003 fully paid up shares respectively to him. Upon issuance, the plaintiff allotted in the names of the first to the sixth defendants, 300 shares each of SFM and 127,500 shares each of SSB. Of the remaining shares in SFM, the plaintiff and eighth defendant were allotted 50 shares each and the seventh defendant was allotted 100 shares. Of the remaining shares issued by SSB the plaintiff and eighth defendant were allotted 5,001 shares each and the first defendant had an extra share. None of the first to eighth defendants paid any consideration for the shares which was solely contributed by the plaintiff. The plaintiff alleged that it was not his intention to allot the shares as an advance or a gift but they were allotted on condition that the first to the seventh defendants held the shares in absolute trust for the plaintiff during his lifetime and thereafter in trust for the eighth defendant for her lifetime and thereafter to the children's respective benefits in proportion to their shareholding.

The plaintiff was at all material times in physical possession of all the share certificates and was also the chairman and managing director of the two companies. However, the day to day running of SFM was entrusted to the first to sixth defendants at various stages but the plaintiff supervised and controlled the management of both companies. The plaintiff also alleged that the first to seventh defendants have conducted the affairs of the two companies in a manner that evinces a manifest intention to appropriate the shares for themselves and to deprive the plaintiff of his beneficial interest. The plaintiff also alleged that the defendants had caused the purported removal of him as director and was excluded from the management of the two companies. Advertisements were placed announcing his removal as director and he was excluded from the premises of the two companies. The assets of SFM were disposed of by the defendants.

In their defence, the fourth to sixth and eighth to tenth defendants denied that the shares were allotted to them as trustees. Further, they contended that valuable consideration was given at the time of allotment, and as shareholders, they had lawfully removed the plaintiff as director. They also averred that the plaintiff and the second and third defendants were being charged for criminal breach of trust of moneys and assets of SFM.

The first defendant averred in his defence that the plaintiff had formed the companies for the purpose of taking advantage of tax benefits and to retain the profits of SFM to buy more assets in SSB. He claimed that he had paid $30,000 for the shares and was responsible for the growth of the two companies since 1979. The plaintiff sought a declaration, inter alia, that the shares were held by the defendants on trust for him.

Held, allowing the plaintiff's application in part:

(1) The principal issue to consider is whether the first to the seventh defendants hold all the shares allotted by SFM in their favour in trust for the plaintiff or whether such allotments were an advancement. It is not in dispute that the English equitable doctrine of advancement has become part of the law of Malaysia.

(2) The plaintiff commenced business as a sole proprietor and as a result of his hard work, the business flourished. The first company was incorporated in order to ensure that his wife would be looked after in the same manner and life style she was accustomed to and ensure that the seventh defendant would be properly married off and the younger children properly educated. As such, the allotment was purely on trust with certain intentions. All the share certificates were kept by the plaintiff and he never gave those certificates to any of the defendants. No consideration was given for the shares and the plaintiff was in full control of the two companies. He utilized the funds without seeking the approval of the shareholders or directors. No complaints were made by any of the directors as to how he conducted the affairs of the companies. His authority was never challenged until recently.

(3) The presumption of advancement could be rebutted by evidence of the transferor. The principal question is to consider what the true intentions of the plaintiff were at the time the shares were allotted in the names of the defendants. From the evidence of the plaintiff which is not seriously disputed by the defendants, it was the intention of the plaintiff to retain the beneficial interest of the shares allotted to the defendants during his lifetime. The conduct of the plaintiff in running the two companies is consistent with his intention. The fact that he retained all the share certificates is most significant.

(4) As the defendants have no defence to the plaintiff's claim, the court can enter summary judgment in terms of the prayers sought although they are for a declaration.

[Bahasa Malaysia summary

Plaintif adalah bapa kandung dan sah defendan pertama hingga ketujuh dan suami sah defendan kelapan. Defendan kesembilan dan kesepuluh adalah syarikat-syarikat yang diperbadankan

dalam Malaysia di mana plaintif dan defendan-defendan adalah pemegang saham.

Dalam 1953, plaintif memulakan perniagaan sebagai seorang pemilik tunggal. Perniagaan bertambah maju dan dia memperbadankan syarikat pertama dalam 1977 dan kedua dalam 1979. Dia memindahmilik semua hak, hakmilik, faedah dan kepentingannya dalam perniagaan itu kepada syarikat pertama ('SFM') dan semua aset-aset tak alihnya kepada syarikat kedua ('SSB') dengan balasan dua buah syarikat itu mengeluarkan 2,000 dan 775,003 saham yang dibayar sepenuhnya masing-masing kepadanya. Setelah pengeluaran itu sahaja, plaintif menguntukkan dalam nama-nama defendan-defendan pertama ke keenam, 300 saham masing-masing bagi SFM dan 127,500 saham masing-masing bagi SSB. Untuk saham yang tertinggal dalam SFM, plaintif dan defendan kelapan diuntukkan 50 saham masing-masing dan defendan ketujuh diuntukkan 100 saham. Untuk saham yang tertinggal yang dikeluarkan oleh SSB, plaintif dan defendan kelapan diuntukkan 5,001 saham dan defendan pertama juga mempunyai satu saham lebih. Tidak satupun daripada defendan-defendan pertama hingga kelapan membayar sebarang balasan untuk saham-saham yang disumbang semata-mata oleh plaintif. Plaintif mengatakan bahawa bukanlah niatnya menguntukkan saham-saham sebagai suatu pendahuluan atau hadiah tetapi mereka diuntukkan atas syarat bahawa defendan pertama ke ketujuh memegang saham-saham itu dalam amanah muktamad bagi plaintif sepanjang hayatnya dan kemudiannya dalam amanah bagi defendan kelapan untuk sepanjang hayatnya dan kemudiannya kepada faedah anak-anak mengikut kadar bilangan saham mereka masing-masing.

Plaintif adalah pada semua masa material dalam milikan fizikal kesemua sijil saham dan adalah juga pengerusi dan pengarah urusan kedua buah syarikat itu. Akan tetapi, pengurusan harian SFM telah diamanahkan kepada defendan pertama hingga keenam pada beberapa peringkat tetapi plaintif menyelia dan mengawal pengurusan kedua buah syarikat tersebut. Plaintif juga berkata bahawa defendan pertama ke ketujuh telah melaksanakan perihal kedua syarikat tersebut dalam satu cara yang menunjukkan niat terang untuk menguntukkan saham-saham itu bagi diri mereka sendiri dan melucutkan plaintif daripada kepentingan benefisialnya. Plaintif juga berkata bahawa defendan-defendan telah menyebabkan dia diberhentikan daripada jawatan sebagai pengarah dan telah disingkirkan daripada pengurusan kedua buah syarikat itu. Iklan-iklan telah dimasukkan menyebahkan pemberhentiannya sebagai pengarah dan dia disingkirkan daripada premis kedua buah syarikat. Aset-aset SFM telahpun dilupuskan oleh defendan-defendan.

Dalam pembelaan mereka, defendan keempat hingga keenam dan kelapan hingga sepuluh menafikan bahawa saham-saham itu telah diuntukkan kepada mereka sebagai pemegang amanah. Selanjutnya, mereka berhujah bahawa balasan bernilai telah diberi pada masa peruntukan, dan sebagai pemegang saham, mereka telah secara sah memberhentikan plaintif sebagai pengarah. Mereka juga berkata bahawa plaintif dan defendan-defendan kedua dan ketiga telah didakwa untuk pecah amanah jenayah wang-wang dan aset-aset SFM.

Defendan pertama mendakwa dalam pembelaannya bahawa plaintif telah membentuk syarikat-syarikat bagi tujuan mengambil kelebihan faedah-faedah cukai dan untuk menyimpan keuntungan SFM bagi membeli lebih banyak aset dalam SSB. Dia menuntut bahawa dia telah membayar $30,000 untuk saham-saham itu dan telah bertanggungjawab untuk perkembangan kedua buah syarikat semenjak 1979. Plaintif memohon satu deklarasi, antara lainnya, bahawa saham-saham dipegang oleh defendan-defendan atas amanah untuknya.

Diputuskan, membenarkan sebahagian permohonan plaintif:

(1) Isu pokok untuk dipertimbangkan adalah sama ada defendan-defendan pertama hingga ketujuh memegang semua saham yang diuntukkan oleh SFM dalam faedahnya untuk amanah plaintif atau sama ada peruntukan tersebut adalah suatu pendahuluan. Tidak dipertikaikan bahawa doktrin ekuiti Inggeris berkenaan pendahuluan telah menjadi sebahagian undang-undang Malaysia.

(2) Plaintif telah memulakan perniagaan sebagai seorang pemilik tunggal dan oleh kerana kerajinannya, perniagaan berkembang. Syarikat yang pertama telah diperbadankan supaya menentukan bahawa isterinya akan dijaga dalam cara dan gaya hidup yang sama sepertimana ia telah biasa dan menentukan bahawa defendan ketujuh akan dikahwinkan dengan wajarnya dan anak-anak muda dididik dengan sempurna. Oleh itu, peruntukan itu adalah semata-matanya atas amanah dengan beberapa niat. Kesemua sijil saham telah disimpan oleh plaintif dan dia belum pernah memberi sijil-sijil itu kepada mana-mana defendan-defendan. Tidak ada balasan yang diberi untuk saham-saham dan plaintif adalah dalam kawalan sepenuh kedua buah syarikat itu. Dia menggunakan wang tanpa memohon kebenaran pemegang saham atau pengarah-pengarah. Tidak ada aduan dibuat oleh sesiapa daripada pengarah-pengarah mengenai cara bagaimana dia mengendalikan perihal syarikat-syarikat itu. Autoritinya tidak pernah dicabar sehingga baru-baru ini.

(3) Anggapan pendahuluan boleh disangkal melalui keterangan pemindah milik. Soalan pokok ialah menimbangkan apakah niat sebenar plaintif pada masa saham-saham itu diuntukkan dalam nama defendan-defendan. Dari keterangan plaintif yang tidak dipertikaikan dengan serius oleh defendan-defendan, adalah niat plaintif untuk memegang kepentingan benefisial saham-saham yang diuntukkan kepada defendan-defendan sepanjang hayatnya. Kelakuan plaintif dalam pengurusan kedua buah syarikat adalah selaras dengan niatnya. Fakta bahawa dia memegang kesemua sijil saham adalah sangat penting.

(4) Oleh kerana defendan tidak ada pembelaan kepada tuntutan plaintif, mahkamah boleh memasukkan penghakiman terus mengikut terma permohonan walaupun mereka adalah untuk satu deklarasi.]

Cases referred to

1 *Palaniappa Chettiar* v *Arunasalam Chettiar* [1962] MLJ 143 (distd)
2 *Neo Tai Kim* v *Foo Stie Wah* [1985] 1 MLJ 397 (folld)
3 *Shephard* v *Cartwright* [1955] AC 431 (distd)
4 *Devoy* v *Devoy* (1857) 65 ER 713 (refd)
5 *Pettitt* v *Pettitt* [1970] AC 777 (refd)
6 *McKie* v *McKie* (1897) 23 VLR 489 (refd)
7 *Re Wozney and Wozney* (1974) 44 DLR (3rd Ed) 637 (refd)
8 *Warren* v *Gurney* [1944] 2 All ER 472 (refd)
9 *Re Gooch* (1890) 62 LT 384 (refd)
10 *Avel Consultants Sdn Bhd & Anor* v *Mohamed Zain Yusof & Ors* [1985] 2 MLJ 209 (folld)

SH Amiruddin for the plaintiff.
Mahadeva Nadchatiram for the first defendant.
SK Sin for the second, ninth and tenth defendants.
M Palanimah for the third defendant.
Lim Kian Leong for the fourth to eighth defendants.

Cur Adv Vult

Zakaria Yatim J: This is an application by the plaintiff for summary judgment in terms of the following prayers:

(1) for a declaration that the first, second, third, fourth, fifth and sixth defendants hold the shares issued by the ninth defendant, Sakthy Flour Mill Sdn Bhd (hereinafter referred to as the 'first company') and registered in the defendants' respective names in trust for the plaintiff;
(2) for a further declaration that the plaintiff is the sole beneficial owner of all the shares issued by the first company save for the shares owned and registered in the name of the eighth defendant;
(3) that the plaintiff be granted the following consequencial orders:

(i) for an order that the first to sixth defendants inclusive and each and everyone of them do forthwith and in any event not later than three days from the date of the order deliver to the plaintiff the following documents:

(a) all the share certificates issued by the first company and tenth defendant, Sinnammal Sdn Bhd (hereinafter referred to as the 'second company'), which were kept by the plaintiff in the safe at the first company's premises;
(b) valid and registerable memorandum and share transfers to effectively transfer such shares issued by the first company and registered in the names of the first to sixth defendants, in favour of the plaintiff;
(c) letters of resignation as directors of the first company;

(ii) for an order that in the event of anyone of the defendants, namely, the first, second, third, fourth and sixth, for any reason whatsoever fail to deliver any of the documents stated above within three days from the date of their order, the senior assistant registrar of this honourable court be empowered to execute such relevant documents which would effectively cause the shares held by the first to sixth defendants inclusive in the first company to be transferred to the plaintiff;
(iii) for an order that the first, second, third, fourth, fifth, and sixth defendants and each and everyone of them render within 14 days from the date of such order complete accounts, documents and other properties relating to and regarding the affairs of the first company with liberty to the plaintiff to falsify and surcharge and to generally inquire into such accounts;
(iv) that the first, second, third, fourth, fifth and sixth defendants do forthwith deliver and in any event not later than three days from the date of the order, all the properties of the first company including properties which were initially registered in the name of the first company but transferred within the last one year to the first to sixth defendants, their respective sponsor or agents and/or servants or nominees;
(v) for an order that the senior assistant registrar of this honourable court be directed to hold an enquiry into the damages suffered by the plaintiff by reason of the first to sixth defendants' wrongful acts and such damages as assessed be paid by the first to sixth defendants jointly and severally to the plaintiff within ten days from the date of such order;

(4) costs;
(5) such further or other directions and orders consequential or otherwise be made as the circumstances of the case warrant and as may be just and equitable.

The plaintiff is the natural and lawful father of the first to the seventh defendants and the lawful husband of the eighth defendant. The first and second companies are incorporated in Malaysia. The plaintiff, his wife and children are the shareholders of the two companies.

The plaintiff's case as pleaded in the statement of claim may be summarized as follows: Sometime in 1953, the plaintiff commenced business as a sole proprietor trading under the name and style of Sakthy Flour Mills ('the said business') which was duly registered with the Registrar of Businesses. The entire capital for the said business was contributed by him and his income was derived solely from the said business. Through his efforts, the business prospered. In 1977 he incorporated the first company under the Companies Act 1965 ('the Act'). On 7 May 1979, he incorporated the second company under the Act. He transferred all his rights, titles, benefits and interests in the said business to the first company and all his immovable assets to the second company in consideration of the two companies issuing respectively 2,000 and 775,003 fully paid up shares to him. Upon issuance of such shares, the plaintiff allotted, on trust, in the names of the first to the sixth defendants 300 shares each of the first company and 127,500 shares each of the second company. Of the remaining shares issued by the first company, the plaintiff and the eighth defendant were allotted 50 shares each and the seventh defendant was allotted 100 shares. Of the remaining shares issued by the second company, the plaintiff and the eighth defendant were allotted 5,001 shares each and the first defendant had an extra share. None of the first to the eighth defendants paid any consideration whatsoever towards the shares. The entire consideration for all the said shares was solely contributed by the plaintiff. It was not the intention of the plaintiff to allot the said share as an advance or a gift. The shares were allotted to them on the condition that the first to the seventh defendants held the said shares in absolute trust for the plaintiff during his lifetime and thereafter in trust for the eighth defendant for her lifetime and thereafter for the children's respective benefits in proportion to their shareholding. The plaintiff contends that the first to the seventh defendants are estopped in law and in fact from denying the existence of the trust and the terms thereof. The express or implied terms of the trust are that:

(a) the first to the seventh defendants hold the shares allotted to them in trust for the plaintiff during his

lifetime and all benefits, rights, titles and interests in the said shares belong to the plaintiff absolutely;
(b) the first to the seventh defendants exercise voting rights in accordance with the wishes of the plaintiff;
(c) the business of the first company is to be managed by the plaintiff during his lifetime or until he voluntarily retires;
(d) the defendants are to remain as a joint family;
(e) the directors' allowances and other emoluments are to be determined in accordance with the wishes of the plaintiff;
(f) the plaintiff and his authority are not to be challenged or in any way questioned in any manner whatsoever;
(g) the defendants cannot remove the plaintiff as director of the first and second companies.

The plaintiff is at all material times in physical possession of all the share certificates issued by the two companies. At all material times the plaintiff remains the chairman and managing director of the two companies. However, the management of the day to day affairs of the first company is entrusted to the first defendant and at various stages to the second, third, fourth, fifth and sixth defendants. But at all material times the plaintiff supervises and controls the management of the affairs of the first and second companies. Sometime in May 1987, the plaintiff was informed that the first defendant had misappropriated sums of money of the first company. The plaintiff caused the removal of the first defendant as the sole signatory to cheques drawn on account of the first and second companies. The plaintiff appointed the second and third defendants as joint signatories to cheques drawn on the first and second companies' accounts. After their appointment, the plaintiff discovered that the second defendant had given a friendly loan of $65,000 to a third party. The cheque was co-signed by the third defendant. The loan was given without the prior consent or knowledge of the plaintiff. The plaintiff then removed the second and third defendants as signatories to cheques. The plaintiff appointed the fourth and sixth defendants as co-signatories to cheques drawn on the first and second companies' accounts. While they were co-signatories to cheques, the fourth and sixth defendants had, without the prior approval and knowledge of the plaintiff, given sums of money to the first and eighth defendants. The fourth and sixth defendants were subsequently removed as co-signatories to cheques. The plaintiff alleges that the first to the seventh defendants, in breach of the said trust and the said terms of the trust, have conducted the affairs of the first and second companies in a manner that evinces a manifest intention to appropriate the shares for themselves and to deprive the plaintiff of his beneficial interest in the said shares. The defendants have caused the purported removal of the plaintiff as director of the first and second companies. The plaintiff has been excluded from the management of the business of the two companies. The defendants have caused advertisements to be placed in newspapers announcing the plaintiff's removal as director of the two companies. The defendants have caused the exclusion of the plaintiff from the premises of the first and second companies. The defendants have acted as the beneficial owners of the said shares. The defendants did not comply with the instructions given by the plaintiff. They have disposed of the assets of the first company. The plaintiff has accordingly suffered loss and damage.

The fourth, fifth, sixth and eighth defendants and the first and second companies, in their statement of defence, deny the plaintiff's allegation that the shares allotted by the first and second companies were allotted as trustees for the plaintiff. They contend that the shares were allotted to them with the intention that they would become the legal and beneficial owners of the shares. According to them no trust, implied or express was ever created. They claim that there was valuable consideration when the shares were allotted to them. The first and second companies were managed by the respective boards of directors. As shareholders, the defendants had lawfully removed the plaintiff as director of the first and second companies. The defendants aver in the statement of defence that the plaintiff, together with the second and third defendants, had been charged with an offence of criminal breach of trust of the moneys and assets of the first company and their trial was pending in the court.

The seventh defendant filed a separate statement of defence but his defence is similar to that filed by the fourth, fifth, sixth, eighth, ninth and tenth defendants.

The first defendant, in his separate statement of defence, avers that the plaintiff formed the first and second companies for the purpose of taking advantage of tax benefits and to retain the profits of the first company to buy more assets in the second company. He claims that he paid the plaintiff $30,000 towards the cost of the shares. He says that he was responsible for the growth of the first and second companies since 1979. The plaintiff suffered a severe stroke and loss of memory and was hospitalized for a considerable length of time. He alleges that the plaintiff had on several occasions deposited money in Singapore and India to evade taxes. He also says that the plaintiff, the second and third defendants had been charged with criminal breach of trust in the court. He avers that valuable consideration was given to the plaintiff in respect of the shares. He also avers that the plaintiff's claim is barred by limitation under the Limitation Act 1953.

The second and third defendants did not file any statement of defence.

The principal issue for the court to consider is whether the first to the seventh defendants hold all the shares allotted by the first company, at the request of the plaintiff, in their respective favour in trust for the plaintiff or whether such allotments were an advancement. It is not in dispute that the English equitable doctrine of advancement has become part of our law. In *Palaniappa Chettiar* v *Arunasalam Chettiar*,[1] which was an appeal from the decision of the Court of Appeal, Malaya, Lord Denning in delivering the judgment of the Privy Council, said at p 145:

> He had also to get over the presumption of advancement: for whenever a father transfers property to his son, there is a presumption that he intended it as a gift to his son: and if he wishes to rebut that presumption and to say that his son took as trustee for him, he must prove the trust clearly and distinctly, by evidence properly admissible for the purpose...

In *Neo Tai Kim* v *Foo Stie Wah*,[2] which was decided by the Privy Council on an appeal from Singapore, Lord Brightman in delivering the judgment of the board stated the doctrine in the following words (at p 399):

> The nature of the presumption of advancement is accurately stated in *Snell's Principles of Equity* (27th Ed) pp 176 et seq, under the distinguished editorship of Sir Robert Megarry VC. 'This presumption of advancement, as it is called, applies to all cases in which the person providing the purchase-money is under an equitable obligation to support, or make provision for, the person to whom the property is conveyed. [eg] where the former is the husband or father of, or stands in loco parentis to, the latter... Accordingly, if a man buys property and has it conveyed to his wife...prima facie this is a gift to her... However, under modern conditions, with the reduction in the wife's economic dependence on her husband, the force of the presumption is much weakened...' The qualification expressed in the final sentence of this quotation reflects views which had been expressed four years earlier by Lord Diplock in *Pettitt* v *Pettitt* [1970] AC 777 at p 824. Sir Robert Megarry rightly referred to 'this presumption of advancement, as it is called' because, as Lord Upjohn pointed out in *Pettitt* v *Pettitt* at p 814, 'it is no more than a circumstance of evidence which may rebut the presumption of resulting trust', ie a trust resulting to the husband if he is the provider of the money. In a case such as the present, where both spouses are the providers of the money, it is no more than a circumstance of evidence which may rebut the inference that they are equally interested.

Mr Amiruddin, counsel for the plaintiff, submitted that when the plaintiff caused the shares to be allotted in the names of the first to the seventh defendants there was a presumption of advancement and the presumption had been rebutted by the plaintiff in his affidavit affirmed on 4 November 1989.

Mr KL Lim, counsel for the defendants, submitted that there was absolutely no evidence whatsoever that the father intended his children to hold the shares on trust for him. He contended that the presumption of advancement had not been rebutted by the plaintiff. In support of his contention he relied heavily on the decision of the Privy Council in the *Palaniappa Chettiar* case[1] and the decision of the House of Lords in *Shephard* v *Cartwright*.[3]

In *Palaniappa Chettiar*,[1] the plaintiff bought 40 acres of rubber land in 1934 in the mukim of Si Rusa, Negeri Sembilan. When he bought that piece of land he already owned 99 acres of rubber land. With the new purchase, his total holding exceeded 100 acres. Under the Rubber Regulations (No 17 of 1934), if a person held 100 acres or more than the permissible production the land would be assessed by an assessment committee. If the holding was less than 100 acres, it would be assessed by the local district officer. In order to avoid these regulations, the plaintiff transferred 40 acres of the rubber land to his son, the defendant. In the memorandum of transfer, the plaintiff acknowledged receipt of $7,000 as consideration but in actual fact no money was paid by the son. In 1950, the plaintiff wanted the son to transfer back the 40 acres to him but the son refused to do so. The Privy Council decided that the transfer by the father to the son was made for a fraudulent purpose, namely, to deceive the public administration of the country; and that the fraudulent purpose was achieved in that the holdings were treated separately by the public authorities. The Privy Council decided that the father could not get the property back.

In *Shephard* v *Cartwright*,[3] a father promoted six private companies and caused the shares of the companies to be allotted to and registered in his name, and in the names of his wife and three children. There was no evidence whether share certificates were issued. The companies were successful and subsequently he promoted a public company which acquired the shares of all the companies. The children signed the requisite documents at the request of their father without understanding what they were doing. He subsequently placed to the credit of the children in separate deposit accounts the amount of cash consideration in respect of the old shares. Later he obtained the children's signatures to documents, the contents of which they were ignorant, authorizing him to withdraw money from those accounts. Without their knowledge he drew on the accounts which were eventually exhausted. He died three years later. The House of Lords decided that when the shares were registered in the names of the children there was a presumption of advancement and the presumption was not rebutted by the executors of the deceased. The House of Lords applied the principle that evidence of declaration and conduct subsequent to the original transaction was admissible only against the party making them and not in his favour. Evidence of the original transaction, however, was admissible for or against him.

It is now necessary to examine the evidence in the present case. It is not in dispute that the plaintiff founded

the family business. The plaintiff commenced business as a sole proprietor trading under the name and style of Sakthy Flour Mill ('the said business') which was duly registered with the Registrar of Businesses. His sole income was from this business. He worked hard and as a result his business flourished. He was able to build up a large capital and acquire substantial properties. It was from the income of his business that he was able to maintain his family and educate his children as they wished. On 14 February 1977 he incorporated the first company. The second company was incorporated by the plaintiff on 7 May 1979. At the time of incorporation, the ages of the first to the seventh defendants were as follows:

First defendant	-	24 years.
Second defendant	-	20 years.
Third defendant	-	14 years.
Fourth defendant	-	19 years.
Fifth defendant	-	13 years.
Sixth defendant	-	10 years.
Seventh defendant	-	18 years.

The plaintiff incorporated the first company in order to ensure that his wife (the eighth defendant) would be looked after in the same manner and lifestyle she was accustomed to, to ensure that his daughter (the seventh defendant) would be properly married off and to ensure that the younger children were properly educated. When he incorporated the first company and allotted the shares in the names of the defendants, the allotment was purely on trust. The plaintiff did the allotment of shares with the following intentions:

(1) should anything happen to him, his children's education and welfare ought not to be affected;
(2) in the event of his death his family would be provided for;
(3) in the event of his death, the younger children should be taken care of;
(4) his children should not destroy by squandering his hard earned wealth;
(5) should he die, there must be a smooth transition of his wealth to his family.

In his affidavit affirmed on 4 November 1989, he avers that at 'no time did I divest myself of the beneficial interest, care and control and management of either the ninth and/or the tenth defendants.' All the share certificates issued by the first and second companies were kept by the plaintiff and he never gave these certificates to any of his children. None of the children ever contributed in the form of money or otherwise as consideration for the shares to be registered in their names. The first and second companies represented and continued to represent the plaintiff's entire life-work and his whole and sole source of income. The plaintiff was in full control of the two companies. Any amount needed for the family was taken by him or with his approval. He utilized the funds of the two companies for the purpose of educating his children without seeking the approval of the other registered shareholders or directors. None of the defendants had complained of the manner in which he conducted the affairs of the companies. He determined who should be appointed and who should manage to do what work in the companies. The defendants never challenged his authority until recently. The plaintiff never gave the defendants dividends until recently. In para 20 of his affidavit the plaintiff declares:

> Time and again I have briefed the defendants of my clear intention for the present and for the future which are essentially as follows, and none of them were ever disputed by the defendants and in particular none of the first to sixth defendants did any act or acts which were contrary to the terms of the trust or my authority:
>
> (a) the first, second, third, fourth, fifth and sixth defendants hold the share in the ninth and tenth defendants in trust solely for my benefit during my lifetime and thereafter for the eighth defendant and that I was the absolute beneficial owner with powers to dispose of the shares as I desired:
> (b) the first, second, third, fourth, fifth, sixth and seventh defendants will exercise their respective voting rights in accordance with my wishes and directions;
> (c) the ninth and tenth defendants will be managed by me during my lifetime or till I voluntarily retire and thereafter such of my sons (the first, second, third, fourth, fifth and sixth defendants) as I nominate and appoint but always subject to my supervision and decision and thereafter by my wife, the eighth defendant;
> (d) the first, second, third, fourth, fifth and sixth defendants will enjoy such benefits as I deem and as long as they are employed by the ninth and tenth defendants and stay together but not otherwise as I verily believe that some of these defendants, left alone, will not prosper but suffer;
> (e) all allowances and payments of whatever nature will be fixed and authorized by me;
> (f) all (save the seventh, ninth and tenth defendants), being kith and kin should enjoy equal benefits and that none of them should be removed as directors unless I so direct.

In para 22 of the same affidavit he states:

> In view of my advancing age and with a view to engage the first, second, third, fourth, fifth and sixth defendants more in the day to day affairs of the ninth defendant, I encouraged them to take part and participate in the day to day affairs of both the ninth and tenth defendants. But, I had at no time reneged or mitigated from my authority or my stand vis-a-vis my absolute beneficial interest in the ninth and tenth defendants.

The plaintiff was in absolute control of the two companies. He hired and fired directors. He changed managers. He changed signatories to cheques. The evidence of the plaintiff is not seriously disputed by the defendants.

In view of the above evidence, I do not think the case of *Palaniappa Chettiar*,[1] cited by Mr KL Lim, is relevant to the present case. It will be recalled that in

that case the transfer of the land to the son was for a fraudulent purpose. There is no such evidence in the present case when the shares were allotted in the names of the defendants. I also find that there is no evidence that when the plaintiff allotted the shares in the names of the defendants it was for the purpose of taking advantage of tax benefits or for the purpose of evading tax. With regard to *Shephard* v *Cartwright*,[3] I do not think that case is applicable to the present case. In that case the father was already dead. In the present case the father is alive to give evidence. In my opinion his evidence is admissible.

In *Devoy* v *Devoy*,[4] the transfer by a father of stock into the joint names of himself, his wife and child was presumed to be an advancement but this presumption could be rebutted by the evidence of the transferor. In that case the father was alive to give evidence. The Vice-Chancellor in his judgment in that case said:

> The only question is whether the evidence of the father is admissible. The transfer by the father into the names of himself, and his wife and child, jointly of a sum of stock, raises a presumption that he intended it as an advancement. That presumption may be rebutted by evidence. But in order to rebut it the evidence must shew the real nature of the transaction. Here the evidence shews that the father intended to confer only a qualified interest and not to make an absolute gift. From the state of his circumstances at the time of the transfer he thought he might be able to afford this sum of stock as separated from the rest of his property, so as to secure it for the benefit of himself and wife and child. But he considered it prudent to preserve a dominion over it for himself, if his circumstances should make it necessary for him to resort to it.

The court held that the father had rebutted the presumption in that case.

In *Pettitt* v *Pettitt*,[5] the House of Lords decided that upon the evidence disclosed in that case it was not possible to infer any common intention of the parties that the husband by doing work and expending money on materials for the house should acquire any beneficial interest therein. In *McKie* v *McKie*,[6] the Supreme Court of Victoria held that there was an intention on the part of the father to retain a life interest in the land, and that this was sufficient to rebut the presumption that the purchase was an advancement to the son. In *Re Wozney and Wozney*,[7] Nitikman J said at p 640:

> It supports the evidence of an intention that all would benefit equally if one ticket should be the winning one and that it was never intended that one separate member should alone benefit.
>
> It is inconceivable to me that there was any intention other than that all members should benefit equally if one of the four tickets became the winning one. The conclusion that all members of the family should benefit equally is totally compelling.

From the above authorities, it is clear that in order to decide whether the plaintiff has rebutted the presumption, the principal question to consider is what were his true intentions at the time the shares were allotted in the names of the defendants.

From the evidence in the present case, I am satisfied that it was the intention of the plaintiff to retain the beneficial interest of the shares allotted to the defendants during his lifetime. The defendants held the shares on trust for the plaintiff.

The conduct of the plaintiff in running the two companies is consistent with his intention. The fact that he retained all the share certificates is most significant. See Underhill and Hayton *Law Relating to Trusts and Trustees* (14th Ed) p 286. See also *Warren* v *Gurney*.[8] In *Re Gooch*,[9] the father kept the share certificates until his death. The court held that in the circumstances of that case the presumption was rebutted. The headnote of that case is reproduced below:

> A father made his eldest son, who was living near him, and was married, a liberal annual allowance. Being desirous of providing his son with some occupation, he took, in the son's name, 100 shares of 101 each in the A company, that number of shares being the necessary qualification for a director; also fifty shares of 1,001 each in the B company, ten shares 'at least' being a director's qualification; and transferred from his own name into that of the son's 500 shares in the C company, a director's qualification being 'at least' 100 shares. The son thereupon became a director of these companies, and received the fees as director, but voluntarily transmitted the dividend warrants on the several shares to the father. Afterwards, at the father's suggestion, the certificates of the shares were handed to him for safe custody, and they were retained by him until his death. The three lots of shares were then found in three envelopes, each envelopes, each indorsed by the father with the number of certificates it contained, two of the envelopes bearing the words 'belonging to me.' The father by his will settled the bulk of his real and personal estate upon his eldest son for life, with remainder to his children.
>
> Held, that the shares were taken in the son's name merely for the purpose of qualifying him as a director; that that being the purpose, the presumption of advancement which might otherwise have come under consideration was rebutted and that the son held the shares as trustee.

In view of all the authorities I have cited and having considered the evidence and all the circumstances in the present case, I am satisfied that the plaintiff has rebutted the presumption.

The question now is whether the court can enter summary judgment in terms of the prayers sought by the plaintiff. The first two prayers are for a declaration. With regard to these two prayers, the court has jurisdiction to enter summary judgment. See *Avel Consultants Sdn Bhd & Anor* v *Mohamed Zain Yusof & Ors*.[10] I am satisfied that the defendants have no defence to the plaintiff's claim in this case.

In the circumstances, I order that judgment be entered for the plaintiff in the following terms:

(1) A declaration that the first, second, third, fourth, fifth and sixth defendants hold the shares issued by the first company, the ninth defendant, and registered in their respective names in trust for the plaintiff.
(2) A further declaration that the plaintiff is the sole beneficial owner of all the shares issued by the first company, the ninth defendant, save for the shares owned and registered in the name of the eighth defendant.
(3) As the share certificates were at all material times in the possession of the plaintiff, all the share certificates are to be returned to him and the defendants will hand over all the share certificates to the solicitors for the plaintiff within one week from the date of this order.
(4) The defendants will pay the costs of this application to the plaintiff.
(5) I make no further order in respect of the other payments, in view of the order made by VC George J on 12 April 1988 in Suit No D3-22-059-88.

Order accordingly.

Solicitors: *Veloo & Co; Mahadevi Nadchatiram & Partners; Sin & Associates; Durai & Associates; Lim Kian Leong & Co.*

Reported by *Yap Shao Sin*

Mohd Arshad bin Salleh v Yasin bin Ibrahim & Ors

HIGH COURT (KEDAH) — ORIGINATING SUMMONS NO 24-1389-89
KC VOHRAH J
24 FEBRUARY 1990

Land Law — 'Banci Sewa' — Deceased held land under 'Banci Sewa' — Land registered in administrator's name — Land occupied by defendants without consent — Application by administrator — Possession of land — Whether plaintiff had locus standi — Whether State land — Kedah Provisional Titles (Transitional) Rules 1967, rr 12 & 13 — National Land Code 1965

Words and Phrases — 'Banci Sewa' — Kedah Provisional Titles (Transitional) Rules 1967, rr 2, 12 & 13

Words and Phrases — 'Dealing' — National Land Code 1965, s 5

The deceased, Mat Arshad bin Hj Dolah, was granted a 'Banci Sewa' in respect of a piece of State land ('the said land') which was not alienated to him during his lifetime. When he died, the Collector of Land Revenue Pendang granted, under the then Small Estates Distribution Ordinance 1955, to the plaintiff letters of administration. The plaintiff in the capacity of administrator was registered as proprietor of the 'Banci Sewa'. This was an application made by the plaintiff by way of summary proceedings under O 89 Rules of the High Court 1980 to recover possession of the said land. The grounds were that the plaintiff, being the administrator of the estate of the deceased, was entitled to possession and that the occupiers, ie the defendants were in occupation without consent. The defendants argued that the said land was State land which had yet to be alienated; and that the State authority was the proper authority to resolve as to who was entitled to be alienated the said land.

Held, granting an order for possession :

(1) With the tangible attributes of land occupied under 'Banci Sewa' arising under rr 12 and 13 of the Kedah Provisional Titles (Transitional) Rules 1967, such land is State land which was given out for occupation to a person before 1 August 1935 and that such land has been provisionally marked for alienation to him. The provisions in the National Land Code 1965 relating to the rent due on and other incidents attaching to alienated land and forfeiture of the land to the State authority apply to a 'Banci Sewa' land as if the State land had been alienated. Under r 12, the person given a 'Banci Sewa' is the true owner of the land; what is required of him to obtain a qualified title (or grant or mukim grant) is to comply with r 15. If the owner has died, the administrator of his estate steps into his shoes. In the present case, the plaintiff was granted letters of administration and had locus standi to act for the estate of the deceased. The argument that the plaintiff had no locus standi to sue in this case must fail.

(2) As for the argument that since the land was State land the State must resolve the issue, the argument cannot succeed as the land in question was not State land simpliciter. It was given on a 'Banci Sewa' to the deceased and was not given to the defendants or to persons through whom they claim. There was no relationship whatsoever between the defendants and the persons through whom they claim on the one hand and the State on the other in so far as the said land was concerned. The land was not theirs and they had not shown that they had